

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB JUNE 29,99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Zinpro Corporation

Serial No. 75/145,534

Edmund J. Sease of Zarley, McKee, Thomie, Voorhees & Sease
for Zinpro Corporation.

Howard B. Levine, Trademark Examining Attorney, Law Office
105 (Thomas G. Howell, Managing Attorney).

Before Seeherman, Quinn and Wendel, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Zinpro Corporation has appealed from the refusal of
the Trademark Examining Attorney to register AMINO ACID
EXTRACTION PROCESS as a trademark for "animal nutritional
feed supplements."¹ Registration has been refused pursuant
to Section 2(e)(1) of the Trademark Act, 15 U.S.C.

¹ Application Serial No. 75/145,534, filed August 5, 1996, based
on an asserted bona fide intention to use the mark in commerce.

1052(e)(1), on the ground that the mark is merely descriptive of the goods.

Applicant and the Examining Attorney filed briefs, and applicant filed a reply brief. An oral hearing was not requested.

It is the Examining Attorney's position that AMINO ACID EXTRACTION PROCESS merely describes the characteristics and use of the applicant's animal nutritional feed supplements. According to the Examining Attorney amino acid extraction is a physiological event in both humans and animals, by which amino acids are extracted from muscles or organs, for the benefit or to the detriment of the living organism. The Examining Attorney asserts that amino acid extraction "is commonly observed in muscles during and from exercise," and "also occurs in the lactating mammary glands of cows." Brief, p. 3. The Examining Attorney further states that "since there is no evidence in the record to the contrary, it appears that the applicant's goods facilitate the occurrence of AMINO ACID EXTRACTION in animals." Brief, p. 3. As a result, the Examining Attorney contends that AMINO ACID EXTRACTION PROCESS merely describes the purpose, use or feature of the goods, namely, animal nutritional feed supplements that

provide for, facilitate or enhance amino acid extraction, or the amino acid extraction process, in animals.

In support of his position the Examining Attorney has made of record the following dictionary definitions:²

amino acid: *Biochem.* Any of a class of organic compounds that contains at least one amino group, -NH₂, and one carboxyl group, -COOH: the alpha-amino acids, RCH(NH₂)COOH, are the building blocks from which proteins are constructed.

extraction: 1. An act or instance of extracting: *the extraction of a molar.*

process: 1. A systematic series of actions directed to some end: *to devise a process for homogenizing milk.*

The Examining Attorney has also made of record excerpts from six articles or abstracts, taken from various on-line data bases, which refer to amino acid extraction:

...extraction of amino acids appears to occur by increased amino acid oxidation and gluconeogenesis. It is this increase in hepatic amino acid extraction in combination with decreased protein synthesis that leads to hypoaminoacidemia.
(article with headline referring to glucagonoma syndrome 21 patients)
"Medicine," March 1996

The significantly increased forearm aminoacid uptake and even greater leg amino acid extraction observed in the subjects receiving daily exercise

² The Random House Unabridged Dictionary, 2d ed., © 1993.

suggests that chronic submaximal exercise produces a systemic as well as exercised limb-specific enhancement of tissue AA uptake.

Article entitled "Chronic submaximal exercise as an adjunct to intravenous feeding in man"

"Surg. Forum" 1985, Vol. 36

Hepatic fractional amino acid extraction is increased by glucagon action during exercise.

(Article entitled "Role of the endocrine pancreas in control of fuel metabolism by the liver during exercise."

Int J. Obes Relat Metabl Disord, Oct. 1995

In order to evaluate the effect of DHAP on muscle amino acid extraction during exercise, we measured arterial concentration and muscle exchange of amino acids in 18 untrained healthy male subjects...

J Sports Sci, Feb. 1993

Title: "Kinetics of amino acid extraction by lactating mammary glands in control and sometribove-treated Holstein cows"

(no article text submitted by Examining Attorney)

J Dairy Sci, Jan 1992

Nonesterified fatty acid and ketone body are not significantly extracted by the pig uterus whereas a significant amino acid extraction occurs in late pregnancy. Uterine uptake of amino acids depends on maternal arterial concentrations....

Pediatr Res, Nov. 1987

A term is merely descriptive, within the meaning of Section 2(e)(1), if it immediately conveys information

concerning a quality, characteristic, function, ingredient, attribute or feature of a product or service. Moreover, the question is not decided in a vacuum, but in relation to the goods on which, or the services in connection with which, it is used. See **In re Venture Lending Associates**, 226 USPQ 285, 286 (TTAB 1985). Thus, applicant's argument that AMINO ACID EXTRACATION PROCESS "could be indicative of any number of goods, including food, vitamins, protein mixtures, medications, etc." and that "there is nothing about the mark which indicates it is being used for animals" (brief, p. 4) is not persuasive. We must determine the question of descriptiveness in terms of the goods with which applicant intends to use the mark, i.e., animal nutritional feed supplements.

We note at the outset that the Examining Attorney has provided a limited amount of evidence. It would have made the decision-making process far easier if the Examining Attorney had obtained from applicant information about the specific nature of the goods on which the mark is intended to be used. In this connection, we note that, according to applicant's reply brief, the mark may actually be in use,

or at least the product has been created.³ We also take exception to the Examining Attorney's statement in his brief, quoted above, that indicates that "since there is no evidence in the record to the contrary," applicant's goods cause a particular activity. It is the Office's burden to prove that a mark is unregistrable, and therefore it is the Examining Attorney's responsibility to put evidence in the record. We cannot draw a conclusion contrary to the applicant's position from the lack of such evidence.

Despite our criticism of the paucity of evidence provided by the Examining Attorney, we nevertheless find that the evidence of record is sufficient to demonstrate that AMINO ACID EXTRACTION PROCESS is merely descriptive of applicant's identified goods. The articles discuss that amino acid extraction is a physiologic process that occurs in animals; therefore, applicant's mark, used on an animal nutritional feed supplements, would immediately convey to purchasers that the feed supplements would have an effect on this process. Thus, the mark describes a characteristic or purpose of the goods.

³ The reply brief refers to submitted specimens, but no specimens are in the file. As indicated above, this application is based on intent-to-use, and no amendment to allege use, or other specimens, appear to have been submitted.

In reaching our conclusion that AMINO ACID EXTRACTION PROCESS is merely descriptive, we have considered applicant's argument that, because there is no evidence that competitors in the animal feed supplement industry have ever used any of the words of applicant's mark in conjunction with their products, this shows that the term is not descriptive. However, as applicant has stated, applicant's product is new, unique, and based on proprietary technology. It would appear that the lack of competitive uses is due to the fact that competitors' products at this point do not have an effect on the amino acid extraction process, rather than an indication that this phrase is not merely descriptive. It is a well-established principle that one cannot exclusively appropriate a descriptive term simply because one is the first user of the mark or the only producer of the particular goods.

Decision: The refusal of registration is affirmed.

E. J. Seeherman

T. J. Quinn

H. R. Wendel
Administrative Trademark Judges
Trademark Trial and Appeal Board